No. 5495

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

TERESA CASELLA,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE

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MAY IT PLEASE THE COURT:

The ruling of the District Court, sustaining our demurrer and refusing to issue the writ, was right, because:

(a) **THE PETITION FOR THE WRIT WAS NOT SIGNED BY THE ALIEN, NOR DOES IT APPEAR THAT SHE AUTHORIZED THE PETITION.**

By R. S. 754 (28 U. S. C. 454) it is required that "application for writ of habeas corpus shall be made * * * by complaint in writing, signed by the person for whose relief it is intended * * *." The

petition here was not signed by Teresa Casella, but by "Mrs. Mary E. Fuella (J. D. B.)," as appears at T. 12. The petition says, in paragraph I,

> "That your petitioner is the daughter of Teresa Casella, the detained above named, and makes this petition for and as the act of her said mother because her detention, as hereinafter set forth, makes it impossible for her to verify this petition on her own behalf." (T. 3.)

But the same section (R. S. 754) provides that the application shall be by complaint "setting forth the *facts* concerning the detention of the party restrained," and all the books declare that facts, as distinguished from conclusions, must be alleged (Loh Wah Suey v. Backus, 225 U. S. 460; Cronin v. Ennis, 11 F. (2d) 237, and cases at 239); "such general averments of legal conclusions, without the slightest indication of the facts on which they are predicated, have been held by the Supreme Court insufficient to support a writ of habeas corpus" (U. S. v. Williams, 204 F. 844, 846); "it was indispensable to the efficacy of these conclusions of law in this pleading that the essential facts which were conditions precedent to the deduction of these conclusions, if there were any such facts, should be set forth in the petition so that the court could perceive whether or not they warranted these conclusions, and this was not done" (Quagon v. Biddle, 5 F. (2d) 608, 609). Not a single fact is alleged here why the detention of Teresa Casella made it impossible for her to sign the petition. *Non constat* whether the Commissioner of Immigration would have promptly and courteously permitted access to her to obtain her signature, if she desired to sign.

Moreover, the petition fails, even in its legal conclusions, to declare that her *signature* could not be obtained; it speaks only of an impossibility "for her to *verify* this petition." The statute does not require verification by her, but only her *signature;* verification may be by another (R. S. 754). The requirement of her signature is not a mere formality, but is derived from a common law principle:

> "A mere stranger has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by habeas to be discharged from restraint. For anything that appears, Captain Child may be very well content to remain where he is. The rule must be discharged."
>
> Ex p. Child, 15 C. B. 238; 139 English Reprint 413.

Compare Ex parte Dorr, 3 How. 103, 11 L. Ed. 514.

(b) THE PETITION WAS FATALLY DEFECTIVE BECAUSE IT CHARGED, ON "INFORMATION AND BELIEF," ESSENTIAL FACTS WHICH, IF TRUE, WERE PECULIARLY WITHIN THE KNOWLEDGE OF THE ALIEN, AND EVASION OF POSITIVE ALLEGATIONS CANNOT BE JUSTIFIED BY THE FLIMSY DEVICE OF SUBSTITUTING ANOTHER PERSON AS PETITIONER FOR THE WRIT.

Paragraph VI of the petition (T. 5) reads:

> "Upon *information and belief* your petitioner's said mother, Teresa Casella, the detained, was not guilty of nor was not found 'managing a house of prostitution, or music or dance hall or other place of amusement or resort habitually frequented by prostitutes.' "

It was necessary to allege the alien's innocence of the ground of deportation, to give substance to the claim

of unfairness of hearing, to show that justice had miscarried, to show that the writ was not sought upon barren, dry, technical slips. Paragraph VI evasively seeks to make that showing. We say, "evasively," because Teresa Casella knew better than any one else whether she had "managed a house of prostitution," etc.; in the language of the books, those facts were "peculiarly within her knowledge." Such facts *must* be alleged positively by a plaintiff, and allegations on "information and belief" are *fatally* defective (Hall v. James, 79 Cal. App. 433; 249 Pac. 877); as pointed out in the case just cited, allegations on "information and belief" are permitted only as to "matters which are peculiarly within the knowledge of the *opposite* party and which the pleader can learn only from statements made by him to others." The evasiveness of paragraph VI cumulates with and points and emphasizes the evasion of the requirement that the alien must *sign* the petition. The petition must, as a matter of law, be read as though Paragraph VI was not in it, and thus read must fall before the general demurrer.

(c) WHILE A HABEAS CORPUS IS A PRIVILEGED WRIT OF FREEDOM, IT MUST NOT BE PUT TO AN ABUSIVE USE; AND THE DISCRETION OF THE DISTRICT COURT WAS WELL EXERCISED IN REFUSING THE WRIT, BECAUSE PARAGRAPH IX OF THE PETITION SHOWED A PRIOR REFUSAL ON A LIKE APPLICATION.

Paragraph IX of the petition reads (T. 10-11):

> "That on October 14th, 1927, your petitioner filed a petition for writ of habeas corpus in behalf of her mother and that on said day the above-entitled court made an order to show cause in

> relation thereto. That thereafter the United States District Attorney interposed a demurrer to said petition and that on December 3d, 1927, the demurrer was sustained and your petitioner's petition dismissed and the detained was ordered surrendered. That the aforesaid petition filed on October 14th, 1927, was drawn by counsel representing your petitioner, who did not have a copy of the record of the proceedings before the immigration authorities in reference to your petitioner's mother, Teresa Casella, as hereinabove set forth and that therefore your petitioner's former attorney was incapable of presenting a petition accurately setting forth the grounds why the writ should be issued. The within writ is accompanied by the record in the proceedings and contains different and additional grounds why your petitioner believes the writ should be issued as prayed herein."

That paragraph abounds in conclusions, and in so far as any facts may be gleaned therefrom upon which to predicate conclusions, the conclusions drawn by the pleader are erroneous. If the lawyer who drafted the earlier application "did not have a copy of the record," the present application is silent concerning whether, he, or any one, made any effort to obtain it; whether, on the earlier application, he sought an ancillary certiorari to bring in the record in aid of the application for a habeas corpus (29 C. J. 196, sect. 232); or any other appropriate remedy (Ex parte Jew You On, 16 F. (2d) 153, 154, col. 2). Paragraph IX is evasively insufficient, contains no allegation upon which perjury can be assigned (Ex parte Yabucanin, 199 F. 366; Ex parte Walpole, 84 Cal. 584), and on its face shows that the earlier application was dismissed on December 3, 1927 (T. 11), followed by

the filing of the present application on January 6, 1928 (T. 13), evidencing two "phases of a protracted resistance" (Salinger v. Loisel, 265 U. S. 224, 225), and a last-minute "rush order and injunction on the eve of deportation" (Ex parte Jew You On, supra). The effect of Paragraph IX was to lodge the second application in the "sound judicial discretion" of the District Court, "guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought," and "among the matters which may be considered and even given *controlling weight* are a prior refusal to discharge on a like application." We quote from Salinger v. Loisel, supra (265 U. S., at 231):

> "The federal statute (sec. 761, Rev. Stats.) does not lay down any specific rule on the subject, but directs the court 'to dispose of the party as law and justice may require.' A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application."

The present application is so plainly devoid of merit, and the appeal so frivolous, that we ask the Court to impose costs for a frivolous appeal, and suggest $250.00, the amount of the cost bond on appeal (T. 20). (This Court has before it at this term two attempts, by successive applications for habeas corpus,

to obtain last-minute delay of deportation, the other case being Caranica v. Nagle, No. 5569).

(d) THE MAIN CHARGE OF THE PETITION IS FOUND IN PARAGRAPH VII, AND IS MADE WHOLLY ON "INFORMATION AND BELIEF," AND IS THEREFORE FATALLY DEFECTIVE.

The whole of paragraph VII (T. 5) is predicated upon "information and belief"; it runs:

> "Upon *information and belief* the said order of deportation of your petitioner's said mother from the United States to Italy is illegal and contrary to law for the following reasons, to-wit:" (Here follows, "First:" unfair hearing; "Second:" insufficiency of evidence; "Third:" what?).

A plaintiff may not allege on "information and belief" facts within, or presumably within, her personal *knowledge* (Hall v. James, supra, and authorities there cited). The petition "annexed a copy of the record of the hearing accorded the detained by the immigration authorities" (T. 5), and the charge of paragraph VII relates wholly to matters, 1, within that record, and 2, occurring in the alien's presence. The charging part of the petition is therefore fatally defective.

Next, passing to the points made by appellant, we reverse the order in which she makes them (1, insufficiency of evidence, and 2, unfairness of hearing), because the Supreme Court has squarely laid it down that the former point is not open to inquiry, if open to inquiry at all, unless the latter point is made good (Chin Yow v. U. S., 208 U. S. 8); and we say that

(e) THE HEARING WAS FAIR.

Assuming, without conceding, that probable cause for the writ can be shown by a charge on information and belief, nevertheless, the matter of paragraph VII does not show probable cause. The charge of "unfairness" is based upon a quibble over an inadvertence in speaking of the date of *one* statement as "February 25th," instead of "February 26th." Postulating *two* statements therefrom, the alien proceeds to magnify the molehill of clerical misprision into a mountain of Unfairness, and sprinkles such epithets and high-sound characterizations as, "illegal," "contrary to law," "manifestly unfair," "manifest abuse," "violation of rights," "greatly prejudiced," and "not accorded a fair hearing," through the charge. But,

> "Since the court had jurisdiction of the parties and of the subject-matter, it is hornbook law that, however wrong the result of the proceeding may be, missteps occurring in the course of it constitute irregularities and errors in procedure only, and they cannot be conjured into anything graver by the use of impressive and high-sounding characterizations."

Briggs v. Hanson, 86 Kan. 632; 121 Pac. 1094; Ann. Cas. 1913C, 242; 52 L. R. A. (N. S.) 1161, at 1164, col. 1;

Gray v. Hall, 75 Cal. Dec. 236; 265 Pac. 246.

The immigration record shows that only *one* statement was taken from the alien (at Sacramento). This statement appears at page 4 of the record (Exhibit A). At the heading this statement bears the date "Feb. 26, 1927" which is shown to be the date that the notes of one of the investigating officers were dictated

to a stenographer at San Francisco and transcribed by the stenographer. The heading also reads "Statement taken at Chico Rooms, Sacramento, Calif., Feb. 25, 1927". In introducing this statement into the record and offering it to the alien to read at the hearing it was referred to by the Examining Inspector as "statement taken from the alien February 26, 1927," he obviously having taken the *date of transcription* appearing in the upper right-hand corner of the statement.

The same contention is made regarding report of the investigating Inspectors, Phelan and Farrelly, which is dated Feb. 25, 1927, and which was, apparently through inadvertence, referred to at the hearing as report dated February 26, 1927. This report appears at page 5 of the immigration record (Exhibit A).

The report of hearing accorded the alien April 20th, 1927, by Inspector T. E. Borden, at which the alien was represented by Attorney Russell, clearly shows that the statement and report appearing at pages 4 and 5 of the immigration record respectively, are those which were then formally introduced and offered to the alien and her attorney for their inspection and that the Examining Inspector's error in referring to the dates thereof was inadvertent. It will be observed that Attorney Russell when referring in his cross-examinaion of the alien and of the investigation officers, Phelan and Farrelly, to the investigation made by these officers, everywhere uses the date "February 25, 1927". (Exhibit A, p. 16-15-14.) Cer-

tainly if he had not been questioning the witnesses upon the basis of the statement taken and report rendered February 25, 1927, which are in the record but upon an alleged statement and report made February 26, 1927, he would not in every instance—four times in all—in the course of his questioning have used the date "February 25, 1927". None of his questions contained any reference to the date February 26th, 1927. In addition it is shown on page 15 of the immigration record that Attorney Russell in his cross-examination of Inspector Farrelly quoted the first question and answer appearing in the statement which is at page 4, and comments upon it having been a transcription of notes of Inspector Phelan as dictated to Stenographer Robert J. Cassidy, whose signature appears at the foot of said statement.

Not only do we say, *de minimus non curat lex,* but we further say that this tempest about a mistake in dates is so plainly sham and frivolous as to amount to impertinence and to trifling with this honorable Court, and well deserves a taxation of costs (the cost bond is in the sum of $250.00) for a frivolous and dilatory appeal. Certainly, effective discouragement should meet abuse of the writ, through successive applications and frivolous claims.

No refuge can be found by the alien in the additional assertion of unfairness, arising from the charge of the warrant of arrest. Objections to the sufficiency of the warrant of *arrest* do not oust jurisdiction, if it appears on a fair hearing that the alien is subject to deportation (C. C. A. 9, Chun Shee v. Nagle, 9 F.

(2d) 342, 343, col. 1, and cases there cited). The petition here, stuffed with evasions as it is, nowhere says that the alien was ignorant of what she was being tried for, nor that she ever asked to reopen the hearing to offer proof against the deportation findings.

We have considered the charges of unfairness, and have shown that the hearing was fair; hence,

(f) THE HEARING HAVING BEEN FAIR, THE JUDICIAL INQUIRY CAN PROCEED NO FURTHER.

This proposition is true, even though the writ is sought by one who claims natural born citizenship (Chin Yow v. U. S., 208 U. S. 8); *a fortiori,* it is true in the case of an admitted alien. As said in Chin Yow's case (208 U. S., at 11):

> "Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned [unfair hearing]. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not."

But, assuming for the argument that the Judiciary may look behind the Executive order of deportation into the evidence upon which it is based, we say that

(g) THE EVIDENCE WAS SUFFICIENT.

The sufficiency of relevant, competent and material evidence is not abated by the addition of irrelevant,

incompetent or immaterial matter (C. C. A. 9, Chin Shee v. White, 273 F. 801); hence, appellant's argument, based upon a claim relating to "an ex parte unsworn statement" is without force. Moreover, Inspectors Phelan and Farrelly, who signed that statement, were produced as witnesses at the hearing and cross-examined by the attorney for the alien (Imazo Itow v. Nagle, 24 F. (2d) 526); an audacious admission of that circumstance is to be found at pages 11 and 12 of appellant's brief.

The evidence was sufficient. It appers from the testimony of Inspectors Phelan and Farrelly given when they were produced at the hearing for cross-examination by the attorney for the alien, that they testified to the same facts related in their report which is at page 5 of the record; viz: that on February 25, 1927, they went to the Chico Rooms at Sacramento, were there solicited by the alien for an act of prostitution, that the alien called in a girl named Marcelle Young, who took one of the officers to another room and named her price for an act of prostitution. From memorandum of the Washington Board of Review (Ex. A, p. 20) it is shown that this oral testimony given by the officers at the hearing at which the alien was represented by counsel constituted the principal evidence upon which the warrant of deportation was based, and we submit that this oral testimony was of itself sufficient to sustain the charge contained in the warrant of deportation. We quote from

Leffer v. Nagle, 22 F. (2d) 800,

decided by this Court:

> "Her conduct, as related by the two officers, is ample to justify the order of deportation. True, a single act of illicit sexual intercourse does not necessarily constitute prostitution, but the solicitation to such an act may be made in such manner and under such circumstances as to constitute the most convincing evidence of an habitual practice."

And, surely, if not "the most convincing evidence," it is at least of enough substance in the present case to fairly support the Executive's finding. The testimony narrated at page 11 of appellant's brief is alone sufficient to support the finding. Counsel stresses the fact that there is no evidence showing that appellant received any of the earnings of the woman Marcelle Young. The charge is not that she received the earnings of a prostitute, or that she is a prostitute herself, but merely that she "has been found managing a house of prostitution, or music or dance hall or other place of amusement or resort habitually frequented by prostitutes." In Itsusaburo Mita v. Bonham, 25 F. (2d) 11, this Court said:

> "The fact that he did not share directly in the earnings is after all only a probative circumstance, possibly neutralized by the consideration that he may have thought the presence of a 'girl' in his house would measurably popularize his rooms."

The finding is supported *independently* of the alien's admission that she had "sported in Alaska," concerning which appellant says so much. We therefore need not consider what question, if any, would be open

to this Court if that admission were the sole support of the finding.

The judgment should be affirmed.

Respectfully submitted,

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